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MAILED

DEC 03 2010

In re Patent No. 6,502,951
Issue Date: January 7, 2003
Application No. 09/727,419
Filed: December 1, 2000
Attorney Docket No. 99 - 1930

OFFICE OF PETITIONS

DECISION ON PETITION
UNDER 37 CFR 1.378(b)

This is a decision on the petition under 37 CFR 1.378(b), filed August 23, 2010 (certificate of mailing date August 17, 2010), to accept two unavoidably delayed payments of maintenance fees for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). **Any such petition for reconsideration must be accompanied by a petition fee of \$350.00.** The fee is \$400.00 as set forth in 37 CFR 1.17(f). However, patentee has overpaid by \$50.00 (the surcharge after expiration is \$700.00, not \$750.00). Therefore, petitioner should submit only \$350.00 if reconsideration is desired. The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued January 7, 2003. The first maintenance fee could have been paid from January 7, 2006 through July 7, 2006, or with a surcharge during the period from July 8, 2006 through January 7, 2007. Accordingly, the patent expired at midnight on January 8, 2007, for failure to timely submit the first maintenance fee.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1).

This petition lacks item (1) above.

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 41(c)(1).

Petitioner states that the delay in payment of the first maintenance fee was unavoidable due to financial difficulties and a state of distress at the time in question. Petitioner states that her handbag was stolen in 2001 with her social security card inside. She was the subject of identity theft. Petitioner states this crime put her into a state of distress. On some unspecified date, she filed bankruptcy. Petitioner appears to be arguing financial troubles and emotional distress caused her to fail to make two maintenance fee payments.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

Acceptance of late payment of a maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses the identical language, i.e. "unavoidable delay". Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)). Decisions on reviving abandoned applications have adopted the "reasonably prudent person" standard in determining if the delay in responding to an Office action was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-515 (D.C. Cir. 1912); and Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141. In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

In essence, petitioner must show that she was aware of the need to pay the maintenance fee, and to that end was tracking it, or had engaged someone to track it before the expiration, but when the fee came due, was "unavoidably" prevented from making the maintenance fee payment due to her financial situation or physical condition until the petition was filed.

In determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person. Ray, 55 F.3d at 608-609, 34 USPQ2D at 1787. It is incumbent upon the patent owner to implement steps to schedule and pay the fee, or obligate another to do so. See California Medical Products v. Technol. Med. Prod., 921 F.Supp 1219, 1259 (D. Del. 1995). That is, 37 CFR 1.378(b)(3) requires a showing of the steps in place to pay the maintenance fee, and the record currently lacks a showing that any steps were emplaced by petitioner or anyone else. In the absence of a showing that petitioner or anyone else was engaged in tracking the

maintenance fee due dates, and that party had in fact been tracking the due dates with a reliable tracking system, such as would be used by prudent and careful men in relation to their most important business, petitioner cannot reasonably show that the delay was unavoidable delay. In re Katrapat, 6 USPQ2d 1863, 1867-1868 (Comm'r Pat. 1988); California, supra. **Put otherwise, the issues of petitioner's financial problems and emotional state are immaterial in the absence of a showing that there were steps in place to pay the fee.**

A showing of unavoidable delay based upon financial condition must establish that the financial condition of the petitioner during the entire period of the delay was such as to excuse the delay. See Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891). The showing of record does not adequately establish that petitioner's entire delay in paying the first and second maintenance fees from January 7, 2007, until the petition was filed on August 17, 2010, was unavoidable within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b).

A complete showing, with supporting documentation, is required of the financial condition of petitioner or the party responsible for payment of the maintenance fees. Such showing should include all income, expenses, assets, credit, and obligations, which made the delay in payment of the maintenance fees from January 7, 2007, until the filing of the petition on August 17, 2010, "unavoidable." A monthly breakdown is preferred.

In essence, petitioner must show that she was aware of the need to pay the maintenance fee, and to that end was tracking it, or had engaged someone to track it before the expiration, but when the fees came due, was financially unable to make the payment until the petition was filed. The showing should include documentary proof of the maintenance fee tracking system, the entry of this patent in that system and an explanation of how the system worked.

A showing of unavoidable delay based upon physical/emotional issues must establish that the physical/mental condition of the petitioner during the entire period of the delay was such as to excuse the delay.

If petitioner persists in arguing physical incapacitation as the cause of the delay, petitioner will have to provide ***documents from licensed health care providers, demonstrating the nature and extent of petitioner's incapacitation***, in such a manner that petitioner was, until the filing of the petition on August 17, 2010, prevented from taking any earlier action with respect to this patent.

Additionally, petitioner must state how she managed to conduct her daily personal and business affairs, including scheduling and settlement of short and long term debts and business obligations, bills, rent or mortgage payments, income taxes etc., during the time in question. Did petitioner fail to make other payments due during the time in question? Please be specific in response. Petitioner must demonstrate that her health problems were such as to cause the payment of the maintenance fee to have been unavoidably delayed.

Preoccupation with other matters which took precedence over maintenance of the above-identified patent does not constitute unavoidable delay. See Smith v. Mossinghoff, 671 F.2d 533, 538 213 USPQ 977, 982 (D.C. Cir. 1982).

If petitioner does not wish to further pursue reinstatement of the above-identified application, petitioner should file a copy of this decision along with a request for refund of the \$2480.00 submitted with the present petition.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. The address listed on the petition is different from the address of record. If petitioner wishes to change her correspondence address please complete and return the enclosed form: CHANGE OF CORRESPONDENCE ADDRESS PATENT (form PTO/SB/123).

A courtesy copy of this decision is being mailed to the address on the petition. However, the Office will mail all future correspondence solely to the address of record.

If patentee wishes to receive any future mailed maintenance fee reminder, a "FEE ADDRESS" INDICATION FORM (form PTO/SB/47) and a Request for Customer Number (form PTO/SB/125) should be filed in accordance with Manual of Patent Examining Procedure, section 2540.

Further correspondence with respect to this matter should be addressed as follows:


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 401 Dulany Street
 Alexandria, VA 22314

By fax: (571) 273-8300
 ATTN: Office of Petitions

By internet: EFS-Web
 www.uspto.gov/ebs/efs_help.html
 (for help using EFS-Web call the
 Patent Electronic Business Center
 at (866) 217-9197)

Any questions concerning this matter may be directed to the undersigned at (571) 272-3230.


Shirene Willis Brantley
Senior Petitions Attorney
Office of Petitions

CC: MARILYN J. MARSHALL
5757 WESTHEIMER RD.
SUITE 3-91
HOUSTON, TX 77057

Enclosures: Blank form: CHANGE OF CORRESPONDENCE ADDRESS PATENT (form PTO/SB/123)

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CHANGE OF CORRESPONDENCE ADDRESS

Patent

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Patent Number

Issue Date

Application Number

Filing Date

First Named Inventor

Attorney Docket
Number

Please change the Correspondence Address for the above-identified patent to:

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Individual Name**
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I am the:

- ☐ Patentee.
- ☐ Assignee of record of the entire interest. See 37 CFR 3.71.
Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96).
- ☐ Attorney or agent of record. Registration Number _____

Signature
 Typed or
Printed Name
Date**Telephone**

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

This collection of information is required by 37 CFR 1.33. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 3 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Mail Stop Post Issue, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

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INSTRUCTIONS: The issue fee must have been paid for application(s) listed on this form. In addition, only an address represented by a Customer Number can be established as the fee address for maintenance fee purposes (hereafter, fee address). A fee address should be established when correspondence related to maintenance fees should be mailed to a different address than the correspondence address for the application. **When to check the first box below:** If you have a Customer Number to represent the fee address. **When to check the second box below:** If you have no Customer Number representing the desired fee address, in which case a completed Request for Customer Number (PTO/SB/125) must be attached to this form. For more information on Customer Numbers, see the Manual of Patent Examining Procedure (MPEP) § 403.

For the following listed application(s), please recognize as the "Fee Address" under the provisions of 37 CFR 1.363 the address associated with:

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Customer Number:

OR

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The attached Request for Customer Number (PTO/SB/125) form.

PATENT NUMBER (if known)	APPLICATION NUMBER

Completed by (check one):

☐

Applicant/Inventor

Signature

☐

Attorney or Agent of record

(Reg. No.)

Typed or printed name

☐

Assignee of record of the entire interest. See 37 CFR 3.71.
 Statement under 37 CFR 3.73(b) is enclosed.
 (Form PTO/SB/96)

Requester's telephone number

☐

Assignee recorded at Reel

Frame

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

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* Total of _____ forms are submitted.

This collection of information is required by 37 CFR 1.363. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 5 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND COMPLETE D FORMS TO THIS ADDRESS.
SEND TO: Mail Stop M Correspondence, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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<input type="checkbox"/> Additional practitioner registration numbers are listed on supplemental sheet(s) attached hereto.				
Request Submitted by:				
Firm Name (if applicable)				
Signature				
Name of person submitting request			Date	
Registration Number, if applicable			Telephone Number	

This collection of information is required by 37 CFR 1.33. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Mail Stop CN, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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Privacy Act Statement

The **Privacy Act of 1974 (P.L. 93-579)** requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether disclosure of these records is required by the Freedom of Information Act.
2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.
3. A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.
4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).
5. A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent Cooperation Treaty.
6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.